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IN THE

Supreme Court of the United States

OCTOBER TERM

R. G. Russ, Jr., et ux, Helen Russ

Petitioners,

vs.

State of Texas, et al,

Respondents,

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION FOR CERTIORARI

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Petitioners R. G. Russ, Jr., et ux, Helen Russ ("Russ") by way of reply to the State respondents brief in opposition to the Petition for Writ or Certiorari would show unto the Court that the State has erroneously stated in its Statement of the Case that the petitioners have misstated the facts and recited factual inaccuracies. These statements by the State of Texas are untrue and apparently are an effort to extricate respondents from the precarious position in which they find themselves. Respondents do this by casting aspersions upon the petitioners factual recitations to the Court. It is unfortunate when counsel engages in a personal attack on the petitioners, such as the one in the State's reply, and such attack demonstrates respondents lack of objectivity. Petitioners will not raise this attack to the dignity of a response. On the contrary, Petitioners have again searched the record with respect to the State's testimony through George C. Wall, Jr., District Engineer,

Texas Department of Highways and Public Transportation, the party who testified he had overall responsibility for the project in question.

Beginning at the bottom of page three of the respondents brief in opposition to Petition for Writ of Certiorari ("opposition brief") the State would have this Court believe that petitioners inaccurately made the statement in the petition that a single feature of the project is admittedly a federal action in itself. This factual statement by petitioners is correct. Reference is made to the transcript of the testimony at the preliminary injunction beginning on December 15, 1978, page 166 beginning at line 2:

"A. I am George C. Wall, Jr.
Q. What's your address Mr. Wall?
A. I live at 5417 78th Street, Lubbock, Texas.
Q. What's your occupation, Mr. Wall?
A. I am a Civil Engineer and District Engineer to the Texas Highway Department, District Five, with headquarters at Lubbock, Texas.
Q. With respect to the Interstate 27 upgrading project that's made the subject of this particular litigation, would it be a correct statement to say that you are the man there in Lubbock that's supervising, overseeing, and is in charge of that project?
A. Yes, sir, it would be."

Continuing with the testimony of George C. Wall, Jr., at page 414 of the transcript we find the following statement beginning at line 8 concerning the crossing of Interstate 27 over the Canadian River Municipal Water Authority's aqueduct:

"Q. What would be the crossing of the Canadian River aqueduct, is that considered a major aspect of this overall project?
A. Yes, sir, I would say that that's a major as-

pect . . ."

Continuing at page 469 of the record, beginning at line 12 Mr. Wall states (with reference to crossing the aqueduct by I-27):

"Q. Would you say that dealing with this particular utility adjustment, whether you cross it with a bridge or encase it or move it, is a major federal action if you know?

A. I believe it would be a major action."

Continuing on Page 4 of the opposition brief the State of Texas makes the following statement, "Another factual inaccuracy is a statement that there will admittedly be an increase in certain auto emissions as a result to the project . . ." again the State of Texas is misleading the Court as Mr. Wall testified in this regard at page 225, line 15:

Q. Are you aware of the fact that in the Impact Statement you say that emissions of hydrocarbons by automobiles will be reduced significantly because by the time you get to building this road the cars will have catalytic converters on them?

A. I am aware of that.

Q. All right. Are you aware of the fact that the catalytic converter has a tendency to discharge sulfuric acid from the exhaust pipe of an automobile?

A. Yes, Sir, I am aware that it does.

Q. Are you aware of the fact that farmers, including my client, up and down the highway, grow cotton that grows right up to the right of way perhaps even a little farther?

(Continuing at page 226)

A. But building the road it doesn't have anything

to do with catalytic converters. They're here regardless.

THE COURT: He says they're going to be out there whether they build this new road or not.

THE WITNESS: Right.

Q. (By Mr. Russ) Don't you say in your Impact Statement that if you build the new road you're going to increase the number of trips and the average daily trips of automobiles?

A. Yes, Sir, and we give some figures in there also.

Q. Right. If you build this new road you're going to have a lot more cars —

A. No, sir, we do not say a lot more. I think we give some specific numbers.

Q. Is it a rather insignificant number?

A. As I recall from this Statement, we state average traffic being, perhaps, say, in the range of ten thousand and new trips two years after completion being in the range of five hundred additional trips, in that range.

(Continuing at page 227 of the record)

Q. So one of the reasons you're building the highway — you're not building it because you need the additional roads for more cars; is that what you're saying?

A. We're saying, yes, sir, that we would have a safer facility by building it.

Q. But you don't need it because you have more cars. You will have more trips down the road; is that correct?

A. Yes, sir.

Q. You do agree that the farmers grow cotton right up and down the road; is that correct?

A. Yes.

Q. And the more trips, the more sulfuric acid comes out of the back of the cars?

A. Yes, sir.
Q. Will you agree that cotton and sulfuric acid don't mix?
A. I don't know about cotton and sulfuric acid.
Q. Do you know whether or not farmers are paid for cotton based upon its color, being a part of the grade, and staple, and the length of the staple, do you know that?

(Continuing on page 228 of the record)

A. I read about these things in the paper. To what degree, I do not know.
Q. That's common knowledge?
A. Yes, sir.
Q. If the grade is not as good you don't get as much money for it?
A. Yes.
Q. Has the Highway Department run any studies at all to determine what effect widening the highway may have on the crops growing up and down the sides of the road?
A. Well, we have the crops growing up and down the side of the road now without injury from the traffic and we are getting catalytic converters now. As a matter of fact, the emissions of the cars that are produced today do have catalytic converters and we do not hear about any damages, at any rate, or see any or know of any.
Q. How do you know you don't have any damages? Have you run any tests or studies?
A. No, sir."

On page 4 of the opposition brief the State characterizes as being an "outrageous factual inaccuracy is the assertion that the EIS contains no discussion of the 'do nothing' alternative and the absence of such discussion is undisputed. This proposition was vigorously disputed. The EIS does contain discussion of the 'do

nothing' alternative . . ."

Petitioners again would show this Honorable Court that George C. Wall, Jr. the gentleman in charge of the overall project and who is responsible therefor, testified about the lack of discussion of the "do nothing" alternative. It is and has been petitioner's petition that the gentleman in charge of the project who signed the environmental impact statement (EIS), speaks with authority and respondents are bound by his testimony. Respondents have made no effort to impeach this witness. Mr. Wall testified regarding the "do nothing" alternative in several places beginning at page 221 of the record below, at line 9:

"Q. That do nothing alternative?

A. Yes, sir.

Q. In the Impact Statement that we're talking about here, is it not a fact that one of the comments was there was no discussion of the do nothing alternative?

A. I believe that is correct.

Q. Was that ever rectified in the comments of the Highway?

A. I'd have to review the Impact Statement."

(Continuing with Mr. Walls testimony at page 222 of the record line 5)

Q. Without doing that, you don't have any recollection at this time of any specific comments addressing itself to the do nothing alternative, do you?

A. I do know that we did consider the do nothing alternative.

Q. "We" meaning the Highway Department?

A. Yes, sir."

Mr. Wall makes the following revealing statement concerning the lack of any discussion of the "do nothing" alternative at page 245, beginning line 9:

"Q. Is there any discussion in the Impact Statement about the impact on the environment of leaving the road in it's current condition of disrepair as you described it and leaking, is there any discussion about what effect that will have on the problem?

A. I do not recall anything being in the Environmental Statement about that, about those specific things. I do recall in the Environmental Statement that we say that the road is rough."

At page 278 of the record beginning with line 1 Mr. Wall's testimony continues concerning the lack of discussion on the "do nothing" alternative as follows:

"Q. All right, does that not appear to be a copy of the letter on the letterhead of the United States Department of Interior, Office of the Secretary, Southwest Region, dated September 12, 1972?

A. It does.

Q. Is that a response from the Department of Interior commenting on that Impact Statement?

A. Yes, sir, it is.

Q. That's what it is?

A. It is.

Q. Would you look over to the last page of that letter on page 41 and read along with me there where it says number three and if I make a mistake, please correct me.

It states: "Alternative to the proposed highway improvement. As presented, the draft statement merely justifies 'building a highway.'

There is no mention of the 'do nothing' alternative, but no related discussion."

Is that accurate?

A. That's accurate.

Q. Essentially is that still the condition of this

Impact Statement?

(Continuing page 279 of the record)

A. The — plus the testimony that has been given here today."

The respondents did not offer any further discussion of the "do nothing" alternative in the EIS.

The State of Texas continues at page 5 of the opposition brief asserting to this Honorable Court that another factual inaccuracy in petitioners statement is the characterization of some property crossed as "wetlands" with the following statement "but if the reference is intended to apply to the property that was discussed in greatest detail in the Trial Court, then it is far afield because the evidence was that Callahan Draw is usually dry. (Finding of Fact No. 27, Petition Appendix B-4)."

The State of Texas distorts the true facts in its own favor and once again makes statements about the Petition for Writ of Certiorari that are distorted and misleading. The evidence and fact finding by the Trial Court (No. 27), was in fact that Calahan Draw was usually dry. An examination of petitioners Petition for Writ Certiorari at page 5 reveals that the allegation is that "Playa lakes" *may* be wetlands and not that Calahan Draw is a wetland. Concerning water and it's retention in Playa lakes petitioner testified at page 101 and 102 as follows beginning at line 25:

"Q. I believe earlier in your testimony you mentioned something about having straightened a stream, is that correct? Did you straighten a stream on your property at any time?

THE COURT: Calahan Draw?

A. (By the Witness) No, I didn't straighten the stream. I followed the course of the stream.

THE COURT: Cleaned it out?

THE WITNESS: And cleaned out the playa lake so I could accumulate the water for irrigation purposes so as to help not use the Ogallala."

Petitioners respectfully submit to the court that they have not misstated or misrepresented facts concerning the trial below to this Court. It is unfortunate that counsel for respondents would engage in such a tactic as to urge to this Court that petitioners would misrepresent the facts. Petitioners are prepared to submit an abstract or the entire transcript for the Court's consideration to further substantiate the factual matters set forth herein should it be required.

WHEREFORE, Respectfully Submitted, petitioners again pray this Honorable Court to grant the Petition for Writ of Certiorari for the reasons herein stated and those herefore stated in the Petition for Writ of Certiorari to review the decision in the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the above and foregoing reply to the opposition brief of the State of Texas have this day been served upon the counsel for the respondents by depositing same in the United States mail, with sufficient postage affixed addressed as follows:

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Dated and signed this 25th day of June, 1981, at Amarillo, Texas.

Philip R. Russ